

Disability Employment Law Overview

for Return-to-Work Coordinators



**Creating Employment Opportunities
for Californians with Disabilities**

Disability Access Services



FACT SHEET

Disability Access Services

The California Department of Rehabilitation (DOR) was designated by the Office of the Governor to serve as the lead state agency in California's efforts to implement the Americans with Disabilities Act (ADA) in state government. The Disability Access Services unit (DAS) was established in 1992 to promote disability rights in state government and DOR partnerships in the community.

The Section serves as a centralized resource for providing public information, training, and technical assistance on the Fair Employment Housing Act (FEHA), ADA, and other related disability laws to state entities, agencies, and One-Stop service delivery systems serving persons with disabilities and employers. Our dedicated staff has extensive professional experience in training, employment service, vocational rehabilitation, physical access, and program assessment. We provide comprehensive consulting services and technical assistance in the following areas:

- Disability Awareness
- Employment Issues
- Accessibility to Programs and Services
- Physical Access Surveys
- Referrals and Resources

The Disability Access Services unit can be reached as follows::

Voice Phone: (916) 558-5755

FAX Phone: (916) 558-5757

TTY:Phone (916)558-5758

E-mail: ADATF@dor.ca.gov

To establish an interagency agreement with our unit, contact:

Viena Tankiamco, Staff Service Manager I,

Phone: (916) 558-5760 or E-mail: vtankiam@dor.ca.gov

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THE 10 COMMANDMENTS of Communicating with People with Disabilities

- I. Speak directly rather than through a companion or sign language interpreter who may be present.
- II. Offer to shake hands when introduced. People with limited hand use or an artificial limb can usually shake hands and offering the left hand is acceptable greeting.
- III. Always identify yourself and others who may be with you when meeting someone with a visual disability. When conversing in a group, remember to identify the person to whom you are speaking.
 - When dining with a friend, who has a visual disability, ask if you can describe what is on his or her plate.
- IV. If you offer assistance, wait until the offer is accepted. Then listen or ask for instructions.
- V. Treat adults as adults. Address people with disabilities by their first names only when extending the same familiarity to all others. Never patronize people in wheelchairs by patting them on the head or shoulder.
- VI. Do not lean against or place your hand on someone's wheelchair. Bear in mind that people with disabilities treat their chairs as extensions of their bodies.
- VII. Listen attentively when talking with people who have difficulty speaking and wait for them to finish. If necessary, ask short questions that require short answers, or a nod of the head. Never pretend to understand; instead repeat what you have understood and allow the person to respond.

- VIII. Place yourself at eye level when speaking with someone in a wheelchair or on crutches.
- IX. Tap a person who has a hearing disability on the shoulder or wave your hand to get his or her attention. Look directly at the person and speak clearly, slowly, and expressively to establish if the person can read your lips. If so, try to face the light source and keep hands, cigarettes and food away from your mouth when speaking.
- If a person is wearing a hearing aid, don't assume that they have the ability to discriminate your speaking voice.
 - Never shout at a person. Just speak in a normal tone of voice.
- X. Relax. Don't be embarrassed if you happen to use common expressions such as "See you Later" or "Did you hear about this?" that seem to relate to a person's disability.

This video is available on loan to state departments through the State Personnel Board.

For video request form, go to SPB's website:

www.spb.ca.gov/civilrights/disability_info.htm

"The 10 Commandments" were adapted from many sources as a public service by United Cerebral Palsy Associations, Inc. (UCPA). UCPA's version of "The Ten Commandments" was updated by Irene M. Ward & Associates (Columbus, Ohio), also as a public service, and to provide the most current language possible for its video and DVD entitled, "The 10 Commandments of Communicating with People with Disabilities".

Video & Trainer Guide, distributed by: Program Development Associates, Post Office Box 2038, Syracuse, NY 13220-2038. Phone: 800-543-2119, Fax: 315-452-0710. Web site: www.disabilitytraining.com

DISABILITY EMPLOYMENT LAW

- Prohibits employment discrimination against individuals with disabilities.
- Requires employers and employees to engage in a timely, good faith, interactive process to make a reasonable accommodation to a known physical or mental limitation.
- Allows an exception to providing such an accommodation if it would impose an undue hardship on the employer or pose a direct threat to an individual with a disability or others.

APPLICABLE LAWS

STATE

- Fair Employment and Housing Act (FEHA)
- Assembly Bill 2222 (2001)
- Assembly Bill 925 (2002)
- Assembly Bill 1950 (2003)
- Government Code Sections 11135 and 19170

FEDERAL

- Title I and Title IV of the Americans with Disabilities Act (ADA)
- Rehabilitation Act of 1973
- Telecommunications Act of 1996

INDIVIDUAL LIABILITY

INDIVIDUALS MAY BE LIABLE AS:

- Harassers
- Any person who retaliates against a person who engages in protected activity
- Any person who aids or abets conduct prohibited by FEHA

EMPLOYMENT PRACTICES COVERED

Includes but not limited to:

PRE-EMPLOYMENT

- Recruitment
- Application
- Medical Exam/Inquiry
- Testing
- Hiring

EMPLOYMENT

- Evaluations
- Disciplinary Actions
- Training & Promotion
- Fitness For Duty Exams
- Layoff/Call Back
- Termination Procedures
- Compensation
- Leaves & Benefits

CRITERIA THAT MUST BE MET TO BE PROTECTED BY DISABILITY EMPLOYMENT LAW

- A physical or mental disability or medical condition that limits one or more major life activities.
- A record or history of such an impairment known to the employer.
- Being regarded or treated as having such an impairment even if it has no present disabling effects.
- By association with a person who has a disability.

Note: Please review FEHA for specific definitions.

QUALIFIED FOR THE JOB

Any applicant or employee must be qualified for the job.

- 1) The applicant or employee must meet the necessary prerequisites (minimum qualifications or MQ's) of the job such as:
 - Education
 - Work Experience
 - Training, Skills, Licenses and Certificates
 - Other job related requirements(Examples: using good judgment, ability to work with people, etc.)
- 2) The applicant or employee must be able to perform the essential functions of the job **with or without reasonable accommodation.**

ESSENTIAL FUNCTIONS

- The position exists to perform the function.
- There are a limited number of other employees available to perform the function or among whom the function can be distributed.
- A function is highly specialized, and the person in the position was hired for their special expertise and ability.
- **Job functions that are not identified as being “Essential” would be considered “Marginal” job functions.**
- **An individual with a disability that cannot perform a marginal job function, should have this work activity re-assigned and instead be given other essential or marginal functions they can perform (concept: 8 hours work for 8 hour pay)**

REASONABLE ACCOMMODATION

BASIC PRINCIPLES

- Both parties are required to engage in a **timely, good faith, interactive** process.
- Generally, the individual with a disability informs the supervisor of the need for reasonable accommodation. There may be situations where the employer may decide to be pro-active in providing an accommodation for a known disability on a case-by-case basis.
- Reasonable accommodations are required for an employee with a disability when there are barriers to performing essential functions of the job.
- It is the responsibility of the employer and employee to work together to make appropriate accommodation choices, as long as the choices are effective.
- An individual is NOT required to accept an accommodation that assists them in performing the essential job functions. However, if an employee refuses an accommodation that would have effectively removed the barriers and allowed the employee to perform the essential job functions, the employee may be deemed to have failed to cooperate with the interactive process.

Note: Assembly Bill 1950 amends CA Government Code Section 19170 to provide for state employees with disabilities an additional 6 months probationary period, subject to the approval of the State Personnel Board, to provide a reasonable accommodation to the employee and for the employee to demonstrate their ability to satisfactorily perform the essential functions of the job.

INTERACTIVE PROCESS

- 1) Generally, the individual with a disability informs the supervisor of the need for a reasonable accommodation. However, there may be situations where the employer may need to be pro-active in providing an accommodation for a known disability on a case-by-case basis.
- 2) If necessary, the employer may gather medical or other pertinent information and documentation to substantiate the need for a reasonable accommodation and to identify the barriers that impact the person's ability to perform the essential functions of the job.
- 3) The employer and employee both explore all possible reasonable accommodation solutions. Both parties assess the reasonableness of each accommodation in terms of effectiveness and equal opportunity for the employee.
- 4) The employer implements the most effective solution, taking into consideration the employee's preferences and that does not impose an undue hardship on the employer's operation.
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 - It is the employer's responsibility to choose the specific accommodation after giving consideration to the preferences of the employee or applicant. An accommodation need not be the best accommodation available as long as it is effective.
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 - An individual is NOT required to accept an accommodation necessary to perform the essential functions of the job. However, if an employee refuses an accommodation that would have effectively removed the barriers and allowed the employee to perform the essential functions, the employee may be deemed to have failed to cooperate with the Interactive Process.
- 5) It is the employer's responsibility to engage in ongoing monitoring for effectiveness of the accommodation(s) and any changes in the employee's ability to perform the essential functions of the job.

REASONABLE ACCOMMODATION

EXAMPLES

- Making existing facilities accessible to and useable by workers with disabilities
-
- Job restructuring
-
- Modifying work schedules
-
- Adjusting or modifying exams, training, materials or policies
-
- Acquiring or modifying equipment or devices
-
- Providing qualified readers or interpreters
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- Only as a last resort, employee “reassignment” to a vacant position

For re-assignment purposes, employers are not required to create new positions or bump another incumbent from his/her position to accommodate the re-assignment needs of an employee with a disability.

Re-assignment transfers are limited by the department’s appointing authority.

DISABILITY INQUIRIES

What questions may be directed to an individual depend largely upon whether the individual is an applicant for a position or is currently employed by the employer.

- Medical examinations are only allowed after a conditional job offer is made.
- Post-offer medical examinations are permissible only where all entering employees in similar positions are required to submit to such exams.
- The results of a medical examination are treated as confidential medical records and must be maintained in separate files.
- Any medical related inquiries must be job related and consistent with business necessity.
- Medical inquiries to help determine the most appropriate reasonable accommodation may be obtained but must be limited to the individual's functional limitations rather than the nature of the severity of the disability or diagnosis.

Consult with your Personnel office or ADA Coordinator. Some agencies or departments may already have procedures and forms available.

INTERVIEW ETIQUETTE

- Focus on Ability NOT DIS-ability.
- Most of the time the applicant or employee will be the one to disclose the disability. Obvious disabilities can only be addressed as far as functional limitations that may affect the ability to do the essential functions of the job.
- An applicant or employee is not required to disclose a disability. However, applicants and employees that have a functional limitation that would affect their ability to do the essential functions of the job are encouraged to disclose so that the interactive reasonable accommodation process can begin.
- An employer has a right to hire the most qualified applicant who can perform the essential functions of the job. However, the employer must provide equal opportunity for everyone to compete for the position.
- For a known disability only the functional limitation(s) should be addressed, not the disability.
- Never seek the “nature or severity” (i.e. the diagnosis) of the disability (this one goes beyond “etiquette”: it is illegal)
For example, you should never ask the person:
“What is wrong with you, what do you have?”
“How bad is your condition, is that going to get worse?””

UNDUE HARDSHIP

The concept of undue hardship includes any action that is:

- 1) Unduly costly*
- 2) Extensive
- 3) Substantial
- 4) Disruptive, or
- 5) That would fundamentally alter the nature or operation of the business.

*The nature of the cost of an accommodation that is considered in determining undue hardship will be the actual cost to the employer.

HEALTH AND SAFETY OF AN INDIVIDUAL WITH A DISABILITY OR OTHERS

The accommodation presents a risk of harm to self or others in such a way that it meets **all** of the following criteria:

1. Significant risk of substantial harm
2. The specific risk must be identified
3. The risk must be current, not one that is speculative or remote
4. The assessment of risk must be based on objective medical or other factual evidence regarding a particular individual

If the 4 criteria above are met, the employer must consider whether the risk can be eliminated or reduced below the level of “direct threat” by reasonable accommodation.

COMPLAINT PROCEDURES

State Personnel Board

801 Capitol Mall, Sacramento, CA 95814
P.O. Box 944201, Sacramento, CA 94244-2010
Phone: (916) 653-1705
Website: www.spb.ca.gov

The California Department of Fair Employment and Housing (DFEH), the Federal Equal Employment Opportunity Commission (EEOC) and the State Personnel Board (SPB) maintain the authority to investigate complaints of employment discrimination. Although disability discrimination complaints can be filed with the Federal Equal Employment Opportunity Commission (EEOC) for alleged violations of the federal Americans with Disabilities Act, the Federal EEOC advises that the state entity (DFEH) should pursue the investigation first because California's disability discriminations laws for broader and afford more protection than the ADA. Applicants or employees alleging a discrimination complaint, have **one year** from the date of the last alleged act to file the complaint with DFEH.

For more information about the DFEH discrimination complaint process, contact:

California Department of Fair Employment and Housing

Phone: (800) 884-1684
Sacramento and Out of State: (916) 227-0551
TTY Number: (800) 700-2320
Website: www.dfeh.ca.gov/complaint.asp

Federal Equal Employment Opportunity Commission

Phone: (800) 669-4000
TTY: (800) 669-6820
Los Angeles Phone: (213) 894-1000
Los Angeles TTY: (213) 894-1121
San Francisco Phone: (415) 356-5100
San Francisco TTY: (415) 356-5098
Website: www.eeoc.gov

ACCOMMODATION MISTAKES TO AVOID

Examples of accommodation mistakes that employers, Return to Work Coordinators, Managers and Supervisors make during the reasonable accommodation process.

Mistake #1 –

Failing to recognize the employee has made an accommodation request.

- ✓ No magic words or magic forms
- ✓ Cannot disregard request if employee did not identify solution
- ✓ Both parties must participate in the process!

Mistake #2-

Rejecting the accommodation request as being an “undue hardship” without fully exploring all of the possibilities.

- ✓ We never done that before.
- ✓ You must be 100% to return to work.
- ✓ What will the others workers say?

Mistake #3-

Allowing the accommodation process to get personal.

- ✓ Separate the personalities from the request.
- ✓ Having a disability shouldn't be a third strike your are “outta here”
- ✓ Having a disability shouldn't be a “get out of jail card”

Mistake #4-

Using the “It’s in the duty statement” defense.

- ✓ Although employer duty statements can be used to as evidence that might make the accommodation request “unreasonable”, to be considered evidence, the duty statements must accurately reflect the work activities the employee performs.

Mistake #5-

Sharing medical or accommodation information inappropriately with others.

- ✓ Follow “don’t ask/don’t tell rule.”
- ✓ Limit information to those with a need to know.
- ✓ Information gathered and disseminated must be “business related” and consistent with business necessity.
- ✓ Keep medical information secured and away from personnel files.”

Mistake #6-

Being “Mr./Ms. Nice Guy” by giving everybody everything.

- ✓ Accommodations must be reasonable.
- ✓ The concept of “reasonableness” changes over time.
- ✓ Having “under ground approval process” is risky business.

Mistake #7-

Failing to act in a “timely, interactive and good faith manner.”

- ✓ Act as quickly as possible.
- ✓ Keep all parties informed of delays/time lines for implementation.

Mistake #8-

Failing to document the accommodation process or the reason the accommodation request was denied.

- ✓ No documentation equals “no defense.”
- ✓ If you did it before or for Joe- why is it suddenly unreasonable!
- ✓ Establish an accommodation review process.
- ✓ Make sure management agrees with accommodations that are denied.

Mistake #9-

Failing to provide the employee with the accommodation appeal process.

- ✓ Employee has right to appeal department accommodation decisions.
- ✓ Appeals must be filed in a timely manner.”

Mistake #10-

Failing to stay current with SPB regulations or state/federal laws changes.

- ✓ “Didn’t know- doesn’t work”.
- ✓ Your managers, supervisors and general staff need Accommodation training.
- ✓ Supervisors create legal risk by not following your department policy and SPB regulations.
- ✓ All employees (including those with mild or late-onset disability conditions) can benefit from knowing their rights and responsibilities.



EMPLOYEE ACCOMMODATION MISTAKES

- ✓ Disclose too much medical information – too soon.
- ✓ Have unrealistic expectations about the accommodation process and employer responsibilities.
- ✓ Wait until their job performance deteriorates arise before asking for an accommodation.
- ✓ Not offering alternate solutions.

TIPS FOR IMPROVING ACCOMMODATION PROCESS

- ✓ Keep your departmental policies updated and provide annual training to managers and supervisors.
- ✓ Maintain contact with your “employees with accommodations” to ensure the practices remain needed or are effective.
- ✓ Include your accommodation policy with other “New Employee Orientation” training materials. Consider annual awareness training.

WEB RESOURCES

- **California Department of Rehabilitation**
www.dor.ca.gov
Information on the Disability Access Section may be accessed from the home page under “Disability Access and Rights in California.”
- **California Disability Access Information**
www.disabilityaccessinfo.ca.gov
Information and links on the major laws, regulations, and areas of interest regarding disability rights and access for persons with disabilities.
- **California State Personnel Board (SPB)** 
www.spb.ca.gov
- **California Fair Employment and Housing Agency**
www.dfeh.ca.gov
DFEH publications may be accessed from the homepage by clicking on “Publications”, then locating the appropriate publication.
- **Department of Personnel Administration** www.dpa.ca.gov
Personnel Management Liaison Memo 2001-031 “Revised Requirements under the California Fair Employment and Housing Act (FEHA)” dated August 15, 2001, may be accessed from:
www.dpa.ca.gov/textdocs/fpmlist.htm
- **Job Accommodation Network** www.jan.wvu.edu 
- **AT (Assistive Technology) Network** www.atnet.org
- **Department of Justice** www.usdoj.ca.gov
ADA Home Page may be accessed from:
www.usdoj.gov/crt/ada/adahom1.htm